90-1764

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

INDEPENDENT FRUIT AND PRODUCE COMPANY, et al.,
Petitioners,

v.

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Should courts interpret collective bargaining agreements which require contributions to a multi-employer pension plan with reference to the history of the parties' customs, usages, negotiations and practices?

2. Should courts permit trustees of multi-employer plans to unilaterally define terms within the bargaining agreement in the absence any clause authorizing the trustees to do so?

3. Are drafters and negotiators of collective bargaining agreements required to anticipate interpretive difficulties which may confront pension plan trustees or, failing to do so, are the parties bound by interpretations propounded by the trustees?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to all proceedings below included all Petitioners, who are as follows: Independent Fruit and Produce Company; N.E. Friedmeyer-Sellmeyer Distributing Company; George A. Heimos Produce Company, Inc.; John Moon Produce Company; Stanley Produce, Inc.; Robert Johnson, d/b/a J. Johnson Fruit & Produce Company; Adolph A. Solomon and Ira Solomon, Statutory Trustees for Adolph & Ceresia Produce Company; United Fruit & Produce Company; Goldman Fruit & Produce; Franklin Produce Company; and Walter A. Rubin, d/b/a M.J.M. Produce Exchange.

The following parties were involved in the proceedings before the trial court and the appeal to the Eighth Circuit Court of Appeals. However, they were neither parties to the motion for rehearing by the Eighth Circuit panel nor

to the motion for rehearing en banc: Salvatore Pupillo, d/b/a Pupillo Fruit Company; Sugar Ripe Banana Company; William Mantia Fruit Company, Inc.; St. Louis Banana and Tomato Company, Inc.; Lamperson Fruit & Produce Company; Lombardo Fruit & Produce Company; Marske Produce; and Jules J. Schwartz and Joseph F. Schwartz, d/b/a New Market Produce Company.

Respondents before this Court, Central States, Southeast and Southwest Areas Pension Fund and its trustee, Howard McDougall, were parties to all proceedings below.

Petitioner, United Fruit & Produce Company, is a wholly-owned subsidiary of United Industries, Inc. Petitioner, George A. Heimos Produce Company, Inc., is a wholly owned subsidiary of CJB Leasing Co. No other Petitioner has any

parent company, subsidiary or affiliate to list pursuant to Rule 28.1.

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Petitioners respectfully petition this Court to issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered on December 6, 1990.

OPINIONS BELOW

A full opinion of the district court was rendered only in the case of N.E. Friedmeyer-Sellmeyer Distributing Co. ("Friedmeyer-Sellmeyer"). That unreported opinion and judgment are set forth in the Appendix (A66-94). The opinions of the district court in the remaining Petitioners' cases adopt the opinion in Friedmeyer-Sellmeyer. Those opinions and judgments are also unreported (A95-143). The opinion of the court of appeals is reported at 919 F.2d 1343 (1990) and set forth in the Appendix (A13-65).

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1990 (A1-12). Petitions for rehearing en banc and by the panel were denied on February 11, 1991 (A144-55). Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Jurisdiction of the federal district court was originally invoked under 29 U.S.C. Sections 186(a) and 1132(a) and Section 306 of the Multiemployer Pension Plan Amendments Act of 1980.

STATUTES INVOLVED

The statutes involved are 29 U.S.C. Sections 186 and 1145 attached in the Appendix (A156-63).

STATEMENT OF THE CASE

1. Introduction

Petitioners are thirteen fruit and vegetable wholesalers operating primarily in the St. Louis, Missouri metropolitan area. As members of a multi-employer collective bargaining group known as the St. Louis Fruit and Produce Association ("Produce Row"), they are signatories to a series of agreements with a Teamster local. Along with approximately 5,000 other businesses, Petitioners' collective bargaining agreements require contributions to Central States, Southeast and Southwest Area Pension Fund ("Central States").

These collective bargaining agreements span consecutive three-year periods beginning in the 1950s and have generally involved approximately twenty-five employers, including Petitioners.

They divide the bargaining unit into three categories of employees: probationary employees, regular employees and employees who are "known as 'casual employees' (casuals)." A166, 173, 178, 182. Contributions to Central States are required only on behalf of regular employees. All collective bargaining agreements require Petitioners to assent to the rules and regulations of the Central States pension plan. Those rules require Petitioners to report the names of the individuals for whom contributions are owed and to remit those contributions to Central States.

However, all agreements specifically relieve Petitioners from any obligation to make pension contributions on behalf of casual employees. The pre-1982 agreements exclude the casuals from all

fringe benefits. Article IX, Section 2., subsection 4 of the contracts provides:

> Fringe benefits shall not be paid on account of casuals (such as, but not limited to, Vacation, Holidays, Sick Leave, Funeral Leave, Jury Pay, LIH [a Union sponsored health plan], Welfare, Medicare, Pension and Charitable Foundation); and no seniority shall be acquired by such casuals.

(A167, 174, 179, 184) (emphasis added). Under the same section, casuals are not guaranteed any hours of work. Later, the 1982-85 agreement provides casuals with four (4) paid holidays but no other benefits. That agreement requires Petitioners to furnish the Union a list of employees, segregating regulars from casuals.

Central States is one of the largest ERISA trust funds in America: its assets on December 31, 1988 exceeded $9 billion; it receives contributions on behalf of more than 250,000 active workers; it is

responsible for benefits to over 125,000 retirees. During calendar 1988, Central States received more than $746 million in contributions. While the Central States plan has been amended many times, no amendment authorized the trustees to determine eligibility for coverage nor the identity of those for whom contributions are made. These questions have always ben determined by the Union and Petitioners in negotiation of the collective bargaining agreements. See Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 571, n. 12 (1985) (under ERISA standard of loyalty to the beneficiaries, an audit of an employer by pension fund would not be legitimate if it were an attempt "to expand plan coverage").

The courts below were faced with the problem of determining the meaning the phrase "known as casuals" under the collective bargaining agreements. The district court examined the parties' agreement concerning the identity of casual employees through evidence of the history of their negotiations and all other relevant factors, except the district court refused to consider any oral modification of the collective bargaining agreements.[1] The trial court found, as a fact, that the persons called "casuals" by Petitioners are excluded from the pension plan as Petitioners and

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[1]In fact, no evidence of any oral modifications was offered by Petitioners as such evidence is beyond the cognizance of a court when offered to excuse an obligation to make pension contributions. Lewis v. Benedict Coal Co., 361 U.S. 459 (1960).

the Union agreed in their written collective bargaining agreements. The district court held that Petitioners had made contributions for regular employees as agreed.

The court of appeals found, however, that those persons "known as casuals" to the employers, Union and the employees could not be casual employees because the regularity of their work brought them outside the definition of "casual employment" found in Black's Law Dictionary requiring that such employment be intermittent. Based on the Black's entry for casual employment, the court of appeals found that the definition of casual employee was unambiguous. This dictionary definition was substituted for the parties' understanding of "known as casual." Because of this definition, the appeals court held that the trial judge

erred in examining the Petitioners', the Union's and the employees' conduct, practice or intent. As many of the casuals were non-intermittent employees, they should, in the judgment of the court of appeals, have contributions paid on their behalf.

Accordingly, the appeals court found no need to address the record before the trial court. The record clearly demonstrates that the history of the agreements and the practice of the parties relieves Petitioners of the burden of contributions for these employees. There is no evidence that the parties believed employees "known as casuals" were to be employed only on an intermittent basis. No witness at trial testified to personal familiarity with a contract using the term "known as casual" or even "casual employee" in such a

limited sense. More importantly, not a single witness testified that Petitioners or the Union had used these terms in such a confined manner during the thirty (30) year bargaining history.

The appellate decision does not find error in the district court's determination that casual employees were clearly excluded from fringe benefits pursuant to the parties' collective bargaining agreement. The court of appeals does not suggest that casual employees could not have been lawfully excluded from pension coverage had they been denominated by some term not found in Black's Law Dictionary, such as "red hats." Doubtless, had casuals been designated by a term carrying no connotation or denotation, their exclusion could have been accomplished. See, UMWA Health and Retirement Funds v.

Robinson, 455 U.S. 562 (1982). The collective bargaining process clearly allows the interests of the casual employees "to be subordinated to the collective interests" of the bargaining unit. Barrentine v. Arkansas Best Freight System, Inc., 450 U.S. 428, 435 (1981). The appeals court does not question the district court's finding that Petitioners performed their agreement to contribute on behalf of regular employees. They, the Union and the employees, all knew that casuals were excluded and knew who were casuals.

Use of "casual employees" is not confined to Produce Row or any particular industry. A study by Cleveland State University commissioned by Petitioners of a data base of 500 collective bargaining agreements randomly selected from a universe in excess of 3000 contracts

discloses the terms "casual" and "casual employee" vary with each employer's circumstances. A185-220. These terms are used to describe a wide range of workers --including at one extreme, workers who "work on a regularly scheduled continuing basis, for a usual specified number of hours from 1-31 per pay period" (A188), employees "who are not on the regular seniority list" (A189), "on a daily basis" (A197), and, at the other side of the spectrum, employees "work solely on call" (A196) or "normally work less than twenty (20) hours per week" (A208). It includes employment which "can be full-time" (A198) and may be "permanently assigned" (A220).

2. Procedure in the District Court.

In 1983, Central States performed a random audit of Lamperson Fruit & Produce Co., which is not a petitioner although

it was a defendant in the district court. In the course of the audit, the employer informed the auditors that casuals were widely used on Produce Row for lengthy periods. Following up on that information, the auditors spoke with Union personnel who confirmed that casuals might work for several years and remain excluded from pension contributions.

Thereafter, Central States brought substantially identical complaints against all Petitioners alleging that Petitioners failed to properly remit contributions to Central States. The complaints request audits of Petitioners' books and records and demand judgment upon the audit results. They further allege that Petitioners are squandering assets and request appointment of a

receiver. The requests for a receiver were denied by the district court.

Following a hearing to establish safeguards in the audit process, Central States examined the books and records of the employers for the years 1979 through 1987. It assessed liability for employees "known as casuals" to the employers and the Teamster local. Central States maintained that contributions were due for all steadily employed members of the collective bargaining unit who were beyond the probationary period.

3. The Factual Context.

In order to conserve the Court's resources, the district court designated N.E. Friedmeyer-Sellmeyer as the lead case on the issue of the meaning of the term "known as casuals." Adhering to this Court's principles for

interpretation of collective bargaining agreements, the district court considered "the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." Transportation-Communication Employees Union v. Union Pacific R.R. Co., 385 U.S. 157, 161 (1966). A83-84.

The district court determined the parties' identification of casuals was intertwined in a long history of dealings. Originally, casuals had been utilized as replacement workers to level labor demands which were "irregular and unpredictable." A85-86. Later, casuals were essentially a second tier of labor performing the same tasks as regulars for extended periods. Before 1982, casuals and regulars were distinguished primarily by the regulars' receipt of fringe

benefits, accrual of seniority, and higher pay. A78. There were also visible distinctions between casual and regular employees: regulars wore Union pins and utilized different time cards than casuals. Prior to 1982, casuals were not Local 688 members. Id. Thus, the trial court rejected Central State's contention that there is a standard definition of "casual employees" to which all signatories of labor agreements must conform. The district court's detailed analysis of the agreements in light of Produce Row operations and the collective bargaining history, inexorably lead to its conclusion that the agreements "clearly excluded casual employees from the benefits afforded regular employees," including pension contributions. A89. The trial court found:

> no secret agreements, false representations, oral modifications or other plans not to abide by the collective bargaining agreements. Quite simply, the Produce Row employers acted exactly as they agreed--they contributed to the pension fund on behalf of regular employees, but not on behalf of casual employees.

(A89-90).

REASONS FOR GRANTING THIS PETITION

The court of appeals' decision should be reviewed because its method of interpreting labor contracts conflicts with an unbroken string of decisions of this Court. By applying different rules to interpret labor contracts when a pension fund is a party, the appeals court has placed long-settled agreements between unions, employees, and employers in jeopardy of being judicially rewritten to the detriment of institutionalized collective bargaining and labor peace. The appeals court's method of

interpretation permits pension fund trustees to construe collective bargaining agreements without regard for the parties' intent. This conflicts with the principle that the agreement of the parties is the source of the employer's obligations to make contributions. Inconsistent with this Court's decisions regarding collective bargaining agreements as generalized codes governing the employer-employee relationship, the appellate court's decision places an impossible burden on drafters of collective bargaining agreements. Specifically, it requires the drafters to identify language which, while crystal clear to them, may be subject to varying interpretation by non-party trustees unfamiliar with the trade practices, usages and customs of the parties.

1. **The Court of Appeals Fails to Follow the Principles of Labor Contract Interpretation Required by this Court.**

By confining its interpretive enterprise to the pages of a dictionary, the court of appeals disregards the intention of the parties, thus failing to adhere to the rulings of this Court which require that foremost importance be given to the parties' intentions. The appeals court's mode of contract interpretation is one most likely to reach a conclusion not in accord with the parties' understanding. This Court has repeatedly insisted that all contracts, including labor agreements, be construed to reach a fair understanding of the parties' intentions. Usages of the parties, such as their commonly held definition of "known as casuals," are interpretive

tools to which courts must refer. Usages are employed:

> [t]o aid in the interpretation of the meaning of the express language of an agreement, . . . [and] to annex terms to the agreement in accordance with the usage, provided they are consistent with the express language or manifestations of intention, though they may contradict or vary implications which would otherwise be drawn from the written . . . expression of the parties.

W. Jaeger, 5 Willston's A Treatise on the Law of Contracts 1-2 (1961).

The same treatise continues:

> [I]t may be said broadly that any usage with knowledge of which both parties are chargeable is always admissible to show the meaning of the language employed. Usage is an ordinary means of proving the local or technical meaning of language and even language which is normally clear and unambiguous may be shown by usage to bear, under the circumstance of the case, a meaning different from its normal sense.

(Id. at 6-7).

In a non-labor context, this Court held over a century ago that "parties who contract on a subject-matter concerning which known usages prevail incorporate such usages by implication" in the absence of language to the contrary. Hostetter v. Park, 137 U.S. 30 (1890).

In the labor law realm, an unbroken stream of decisions from at least United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), to Firestone Tire and Rubber Co. v. Bruch, 489 U.S. ---, 109 S.Ct. 948 (1989), interprets agreements with reference to the parties' intentions, which may be manifested through their usages. It is notable that the appeals court, presented with numerous citations of cases from this Court, fails to mention even one in its opinion.

The appellate opinion deviates from the mandate of this Court that the "law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained." NLRB v. C&C Plywood Corp., 385 U.S. 421, 430 (1967). The Eighth Circuit's prior adherence to this rule in such cases implies that its departure is attributable only to the involvement of a pension fund in what it views as a "simple collection action." 919 F.2d, at 1348. The dangerous essence of the court of appeal's decision is that past, current and future labor agreements will be interpreted without reference to the intention of the negotiating parties when a pensions funds' rights are in the balance. The appeals court's decision upsets the economic expectations of Petitioners and the Union. Petitioners

will have to pay pension benefits on a group of employees that they and the Union intended to exclude from the pension contributions. The effect, then, is the retroactive assessment of pension contributions for a significant number of years which may be an economic burden imperiling the continued operation of Produce Row and continued employment of the workers.

Petitioners simply contend that as a matter of written contract, the individuals for whom Central States claims contributions are those persons "known as casuals" as that term is used in thirty years of collective bargaining agreements. The district court so found. Questions of fringe benefits coverage under labor agreements can be resolved only by the parties. UMWA Health and Retirement Funds v. Robinson, 455 U.S.

562 (1982). In saddling this case with the disparaging label of "simple collection action", the appeals court overlooks that the dispute revolves entirely around "both the existence and extent of the employer's liability." Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., 484 U.S. ---, 108 S.Ct. 830, 837 (1988). Such matters are not the simple collection actions toward which Congress expressed its abhorrence in passing Section 515 of ERISA (29 U.S.C. Section 1145). In Petitioners' case the only dispute is one of contract interpretation. Thus, these cases could have as easily been filed as suits for declaratory judgment.[2] In

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[2]The record of the one audit conducted by Central States prior to filing suit indicates that the trustees were well aware of the nature of the dispute. To

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ascertain the actual intent of the parties regarding how "casuals" were defined and utilized on Produce Row, Central States sought out the Union business agents who had been assigned to Produce Row. One informed them that "There is no limit to the number of casual employees compared to regular employees," and:

> [C]asuals can work full time for a long period of time (for example 10 years) without becoming regular . . . the employer decides who and how many employees they want to hire as casuals and how many employees they hire as regulars.

(A221).

Another business agent told them:

> Casuals don't necessarily work full time. But it is possible for casuals to work full time for a period of years. I asked then how could I distinguish between the two. He said casuals are hired as casuals & regulars get Pension contributions paid on them.

(A223) (emphasis in original of auditors' notes).

This as well as other conversations lead to the auditors' conclusion that:

fact, a single declaratory judgment suit could and perhaps should have been filed.

The court of appeals did not disagree with the trial court's factual findings. It did not cavil with the district court's conclusion that the parties intended that no contributions be made to Central States on behalf of persons known to the Union and Petitioners as casual employees. It found, however, that the term "casual employee" was unambiguous. The asserted unambiguity relieved the court of appeals from considering evidence of the parties' practice and conduct under the

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> The company has not remitted pension contributions for a number of employees with solid work history (forty hours per week, fifty-two (52) weeks per year). They perform the same work as employees reported to the Fund, but receive a lower hourly wage.

agreements. The appeals court found (and Petitioners admit) that many of the employees for whom Central States seeks contributions were not within the ambit of the dictionary definition. In essence the appeals court disregarded the clear intention of the Union, Petitioners and the employees themselves that a group called "casuals" were excluded from the pension contributions regardless of the regularity of their employment. This appeals court analysis followed solely from the definition in Black's Law Dictionary (5th ed. 1979) of "casual employment" (not "casual employee") which states:

> Employment at uncertain or irregular times. Employment for short time and limited and temporary purpose. Occasional, irregular or incidental employment. Such employee does not normally receive seniority rights nor does he normally receive fringe benefits.

This is precisely the type of abstract definition which should not form the sole tool for construing a labor contract. C&C Plywood, at 430; F. Elkouri & E. Elkouri, How Arbitration Works 352 (4th ed. 1985). Application of such a definition is left to the district court upon remand. Being abstract, the definition lacks utility in application.

The Cleveland State University study confirms that there are nearly as many linguistic usages for "casual employee" as there are collectively bargained agreements. Use of the term depends upon the industry, the locale and most importantly, the specific parties' intent. The linguistic uses of "casuals" follow their use in the workplace.

Other cases using "casual employee," "casual" and similar terms also yield mixed results. For example, in Rupe v.

Spector Freight Systems, Inc., 679 F.2d 685 (2d Cir. 1979), the contract specified that a casual was "Any employee hired as a casual or part-time worker . . . where it has been agreed by the Employer and Union that he was hired for casual or part-time work." (At 689). In Rupe, casuals and regulars were indistinguishable on the basis of job duties and hours of employment. Other definitions are contained in other contracts which are treated in cases such as B.G. Costich & Sons, Inc. v. NLRB, 613 F.2d 450 (2d Cir. 1980), and Lehman v. Yellow Freight System, Inc., 651 F.2d 520 (7th Cir. 1980). These citations are not exhaustive of the cases or circuits which have considered the terms "casual" and "casual employment." E.g., Tatum v. Frisco Transportation Co., 626 F.2d 56 (8th Cir. 1980). Those cases cannot

pretend to scratch the surface of the collective bargaining agreements utilizing those terms in varying ways.

For these reasons, this Court has avoided formulating unbending rules of labor contract construction which thwart the parties' intentions. Courts cannot be so limited when they recognize that a labor contract involves more than a simple relation between the parties. Such contracts engender and encompass the "entire employment relationship" and invoke the "common law" of a trade, industry or shop. United Steel Workers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 579 (1960). Reaching the parties' intention is the goal of contract interpretation whether the rights of a pension plan or other parties are affected. Firestone Tire and Rubber Co. v. Bruch, 489 U.S. ---, 109 S.Ct.

948, 955 (1989). To do so courts must "consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." Transportation-Communication Employees Union v. Union Pacific R.R. Co., 385 U.S. 157, 161 (1966).

In Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984), the issue involved the forum in which the trustees were required to press their claims, i.e., arbitration or federal court. This Court found that the parties in Schneider had not contemplated the trustees; thus, they had no intent to bind the trustees to arbitration. That lack of intent and the concerns of Congress found in the MEPPA amendments to ERISA lead this Court to the conclusion that the parties had not bound the trustees to arbitration.

The Court stated, however, that the parties could by explicit agreement bind the trustees to use arbitration.

The appeals court's disregard of the parties' intent implicitly invokes the only judicial exception this Court has created to the rule that labor contracts are to be construed with an eye to discovering the parties' intentions: when the union and the employer orally agree to disregard a written contract to the detriment of the pension plan and covered employees, no waiver of pension contributions will be enforced against the pension fund trustees. Lewis v. Benedict Coal Co., 361 U.S. 459 (1960). This result is mandated by the provisions of 29 U.S.C. Section 186(c)(5)(B) requiring pension agreements to be placed in writing. The teachings of Benedict Coal receive vigorous application by the

circuits in pre- and post-ERISA cases. E.g., Bituminous Coal Operators' Ass'n, Inc. v. Connors, 867 F.2d 625 (D.C. Cir. 1989) (unilateral and mutual mistake of fact are not defenses); Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986); Operating Engineers Pension Trust v. Beck Engineering & Surveying Co., 746 F.2d 557 (9th Cir. 1983); Mo-Kan Teamsters Pension Fund v. Creason, 716 F.2d 772 (10th Cir. 1983) (dicta), cert. denied, 464 U.S. 1045 (1984); Waggoner v. Dallaire, 649 F.2d 1362 (9th Cir. 1981) (fraudulent inducement of employer to enter agreement to contribute not a defense), cert. denied, 475 U.S. 1064 (1986); Lewis v. Seanor Coal Co., 382 F.2d 437 (3d Cir. 1967), cert. denied, 390 U.S. 947 (1968).

It is important to note that this line of cases does not involve interpretation of a promise to pay

contributions, but a claimed defect in contract formation or a superseding modification of the obligation. In these cases the problems arise either contemporaneously with or shortly after the initial obligation. Resolution does not entail a court employing a judicial saw against the grain of thirty (30) years of the parties' dealings. Petitioners' cases require judicial construction of an effective, written, unmodified promise to pay, i.e., what did Petitioners, the Union and the employees agree to do in consideration of the others' obligations under the collective bargaining agreements? As will be elucidated in Section 3 below, the Benedict Coal line of cases does not involve situations where the parties were unable to protect themselves against a surprising result by legitimate, readily

available means: an oral modification can be satisfactorily reduced to writing. However, the common law of the workplace, by its very nature, is not so easily susceptible to codification.

Although it cited neither Benedict Coal nor its progeny, the appeals court must have invoked this exception, since there is no other arguably pertinent ruling case from this Court permitting judicial disregard of the parties' intentions. Invocation of Benedict Coal is inappropriate in Petitioners' cases since the district court found, and the appeals court did not dispute, that there were no agreements reached not to abide by the written agreement. The only question to be determined is the meaning of the parties. The court of appeals does not disagree that the employees called "casuals" were beyond the

obligation of the employers to contribute as understood between the Union, Petitioners and their employees; the opinion simply limits itself to the dictionary definition of "casual employee" and consequently finds that the employees who were known to the contracting parties as casuals were not casuals in fact.

2. **The Appeals Court Allows Pension Trustees Unfettered Discretion in the Interpretation of Collective Bargaining Agreements to the Detriment of the Collective Bargaining Process in Disregard of Decisions of this Court.**

The collective bargaining process assumes that the parties fully negotiate to reach an understanding of their obligations and benefits, or failing to reach agreement, they engage in economic sanctions. NLRB v. Amax Coal Co., 453

U.S. 322, 336 (1981). Thus, trustees are bound to accept collective bargains as they find them and are without power to obtain contributions not required under the collectively bargained agreements. Id. at 336; Central States Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 571, n. 12 (1985). The collective bargaining process operates successfully for only so long as the parties are certain that their understandings are not subject to rewriting or renegotiation by outsiders. The circuit court, however, subjects the bargaining process to two forms of unrestrained meddling by the trustees.

First, the appellate opinion grants unrestrained deference to Central States' interpretation of the contracts. The circuit court believes that "Central States thought it knew what the employers

meant by 'casual employee' because of that term's common meaning" 919 F.2d, at 1350. To the trustees this confides the right, subject to no standard, to read the contract and nothing more. Not even "good faith" controls the trustees.[3] Permitting such an unrestrained review gives the trustees power to rewrite an agreement to which they are not a party potentially destroying the economic relationship between the parties.

This potent weapon is not available to any party. Cases from this Court make it plain that such a weapon is

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[3]In matters of contract interpretation, Central States' own audit procedure requires discussion contract language with the parties. When that was done in this case, Central States found the parties unanimous in understanding that casual employees could perform the same jobs as regulars for extended periods without being reclassified as regulars. The results of those discussions appear at footnote 2.

unavailable to the trustees in any other context and, as a matter of policy, should not be utilized here. For example, a clause allowing pension trustees the right to make a good faith interpretation of a trust instrument permits their interpretation only "significant weight." Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S., at 568; Firestone Tire & Rubber Co. v. Bruch, 489 U.S., at---, 109 S.Ct., at 955. However, in the absence of such a clause, even the trustees will be bound by the settlor's intention which must be discerned using the tools of contract construction. Firestone, 109 S.Ct. 955.

In this case, the trustees have no colorable claim to interpret the documents which are not trust instruments, but collectively bargained

agreements. Manifestly, it is not the pension fund that determines the extent of coverage. Coverage is an issue confided to the contractual relation of the parties whether that issue is determined fairly or unfairly. UMWA Health and Retirement Funds v. Robinson, 455 U.S. 562 (1982). As these coverage questions rely upon the parties' agreement, they must be subject to the typical rules of contract interpretation.

Second, the appeals court implies that significant weight is to be given to the trustees' actuarial assumptions. This is contrary to this Court's decisions confining trustees to a neutral role in labor disputes. Amax Coal Co., at 336-37. The appeals court finds there would be significant actuarial detriment to accepting contributions exclusively for regular employees since it believes

they are those most likely to receive benefits upon retirement. 919 F.2d, at 1348.[4] According to the appellate court, the trustees would have been unlikely to accept the Produce Row collective bargaining agreements had they known of the interpretation of "casual employees" given by the parties. Conversely, Petitioners would have been unlikely to execute the agreements had they known of the interpretation which would be given by Central States years after negotiations were over and after the employers had relinquished their right to obtain other economic concessions from the Union or lock out all employees,

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[4]At trial no actuarial evidence was presented. The evidence adduced showed that many casuals work for sustained periods of time, like regulars. That is facially inconsistent with the belief that casuals are more or less likely to make claims for benefits than regulars.

casuals and regulars alike. The trustees' only duty is one of strict loyalty to the plan's beneficiaries and participants. Amax Coal Co., at 329-30. They have no power to negotiate or participate in deliberations regarding the agreement between employer and union. Id., at 334. Permitting the trustees to interject actuarial assumptions into the interpretation of the collectively bargained agreement after the fact, confides in them more than mere negotiating power. It grants them the proscribed power to "require employer contributions not required by the originally collectively bargained contract." Id., at 336.[5]

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[5]The Eight Circuit's reliance upon actuarial assumptions may also mask an invalid argument that casual employees may make claims against the trustees alleging entitlement to benefits. Article VIII of the collective bargaining agreements

By allowing the unfettered trustees to subject contracts to arbitrary dictionary definitions, the appeals court throws a pale upon years of labor negotiations and hundreds of contracts, including many unearthed in the Cleveland State University study. This Court has made clear that labor agreements cannot be torn from their context. Words must be read in light of the history of the parties' dealings and trustees have no

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provides a grievance procedure for all disputes arising under the contracts and is available to any employee claiming misclassification. On one occasion, two employees elected to utilize this procedure. Following Union rejection of their claim, they filed an unfair labor practice charge against both the employer and the Union. The NLRB affirmed their classification as casuals. Failure of other employees to initiate a grievance through the available procedure precludes them pursuing benefits from Central States. Republic Steel Corp. v. Maddox, 379 U.S. 650, 657-58 (1965).

special power or ability to read and interpret these words.

3. **The Appeals Opinion Requires the Parties to Carry an Impossible Drafting Burden which is Inconsistent with Federal Law and the Purposes of Collective Bargaining Agreements.**

The appeals court finds that Section 515 of ERISA "requires that what the parties to the bargaining agreement intended must be made clear from its face." 919 F.2d, at 1352. The net result is that if the employer and union intended a slightly different meaning than that expressed in any dictionary selected by a court, this must be made clear to pension fund trustees. The nature of labor agreements make this an impossible burden. No other court has imposed this requirement and Section 515 cannot be read in such a way.

Labor agreements are more than a mere amalgam of words following in logical and grammatical order. Collective bargaining agreements are drafted and negotiated against the background of the common law of the shop which implements and furnishes its context. The particular practice, usage and customs of the workplace must be integrated into the agreement. Even the negotiators may be unaware of "many of the specific practices . . . except in hazy form." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580-81 (1960). Again, this Court has long recognized that the "law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained." NLRB v. C&C Plywood Corp., 385 U.S., at 430 (1967).

This Court's decisions recognize the intensely practical aspects of collective bargaining agreements. See Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 735 (1981). While occasionally the parties may realize there is an ambiguous area needing clarification, it is far more unsettling if they believe their accord is clear. The negotiators may not recognize these hazy areas. In over thirty (30) years of collective bargaining, neither the Union, Petitioners nor their employees believed there was any ambiguity surrounding the phrase "known as casuals." It is unlikely that any of the 334,000 individuals identified by the Cleveland State University study are aware that they may not be casuals as that term is now judicially defined.

The court of appeals imposes upon employers the impossible obligation to identify interpretive difficulties which they may not know "except in hazy form." The parties have lived with these agreements and with their practices for too long to view them from the outside. But the appeals court requires not that these hazy areas be identified from the perspective of the parties, but from the vantage of a third-party trustee who is barred under Amax from participating in the negotiations.

The parties cannot identify such fuzzy areas until after the fact when faced with a contributions claim leveled against the employer. This is contrary to the purpose and spirit of collective bargaining which requires that the parties have knowledge of the substance and intent of their agreement. The court

of appeals permits this intent and the economic consequences of the agreement to be rewritten, and thus, destroyed long after the agreement has been performed by the parties.

Petitioners agree that trustees are not bound by unwritten understandings of the parties which contravene the written document. This rule is reasonable. If the parties wish to alter the terms of their bargain, consistent with 29 U.S.C. Section 186 (c)(5), they may execute a written amendment. Passage of Section 515 indicated Congressional approval of Lewis v. Benedict Coal Co. However, Congress' action did not indicate, nor does the legislative history intimate, that there were to be a new and different rules for interpretation of the written words of collective bargaining agreements. No employer, union or

employee can determine whether the denotative meaning of words used precisely squares with the meaning they hold in common when gathered around a heated bargaining table. Under these circumstances, they have no inkling that a written amendment is appropriate. Leaving interpretive difficulties to be resolved years later on the basis of the trustees' dictionary provides labor negotiators with only the certainty that they know not what they negotiate.

CONCLUSION

The court of appeals has placed all parties to collective bargaining agreements requiring pension contributions in jeopardy of having such agreements judicially rewritten based on pension fund trustees' understandings of such agreements. Alternatively, the appellate court requires that labor

negotiators do the impossible by identifying terms and portions of contracts which, while clear to them, may be subject to misconstruction by pension trustees. Such a duty is inconsistent with the fundamental purposes of labor agreements. The decision places unbargained burdens upon the employer and by upsetting the economic understanding, throws into doubt employers' continued viability.

For these reasons, Petitioners respectfully request this Court to issue a Writ of Certiorari.

Respectfully submitted,

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